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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 STEVEN M. SMITH,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Acting
14 Commissioner of the Social Security
Administration,

15 Defendant.
16

CASE NO. 3:13-cv-06082-JRC

ORDER ON PLAINTIFF'S
CONTESTED MOTION FOR
ATTORNEY'S FEES
PURSUANT TO THE EQUAL
ACCESS TO JUSTICE ACT

17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
18 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
19 Magistrate Judge and Consent Form, Dkt. 6; Consent to Proceed Before a United States
20 Magistrate Judge, Dkt. 7). This matter comes before the Court on plaintiff's contested
21 motion for attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412
22 (hereinafter "EAJA") (*see* Dkt. 33; *see also* Dkts. 34, 35).
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1 Subsequent to plaintiff's success at obtaining a reversal of the decision of the
2 Social Security Administration, defendant Acting Commissioner challenged plaintiff's
3 request for statutory attorney's fees on the grounds that defendant's position in this
4 matter was justified in substance and had a reasonable basis in fact and law.

5 Because this Court disagrees, and because the requested fees are reasonable,
6 plaintiff's motion for statutory fees should be granted. Dkt. 33.

7 BACKGROUND and PROCEDURAL HISTORY

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9 On December 8, 2014, this Court issued an Order affirming the Social Security
10 Administration's decision to deny benefits (*see* Dkt. 23). Plaintiff appealed this decision
11 to the Ninth Circuit Court of Appeals on February 6, 2015 (Dkt. 25). On August 3, 2017,
12 the Court of Appeals issued a Memorandum which reversed and remanded this matter to
13 the Administration for further proceedings (Dkt. 28).

14 The Ninth Circuit Court of Appeals found that the ALJ erred when reviewing the
15 medical evidence and when failing to credit fully medical opinions (*see id.*, pp. 2, 6). This
16 matter was reversed pursuant to sentence four of 42 U.S.C. § 405(g) for further
17 consideration due to the harmful errors (*see id.*).

18 Subsequently, plaintiff filed a motion for EAJA attorney's fees, to which
19 defendant objected (*see* ECF Nos. 33, 34). Defendant asserts that her position was
20 substantially justified and that no attorney fees should be awarded under the EAJA. Dkt.
21 34, pp. 3-4). Plaintiff filed a reply (*see* ECF No. 35).

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According to the United States Supreme Court, “the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The government has the burden of proving that its positions overall were substantially justified. *Hardisty v. Astrue*, 592 F.3d 1072, 1076 n.2 (9th Cir. 2010), *cert. denied*, 179 L.Ed.2d 1215, 2011 U.S. LEXIS 3726 (U.S. 2011) (*citing Flores v. Shalala*, 49 F.3d 562, 569-70 (9th Cir. 1995)). Further, if the government disputes the reasonableness of the fee, then it also “has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits.” *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992) (citations omitted). The Court has an independent duty to review the submitted itemized log of hours to determine the reasonableness of hours requested in each case. *See Hensley, supra*, 461 U.S. at 433, 436-37.

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DISCUSSION

In this matter, plaintiff clearly was the prevailing party because he received a remand of the matter to the administration for further consideration (*see* Order re: Mandate, Dkt. 30). In order to award a prevailing plaintiff attorney fees, the EAJA also requires a finding that the position of the United States was not substantially justified. 28 U.S.C. § 2412(d)(1)(B).

The Court notes that the fact that the Administration did not prevail on the merits does not compel the conclusion that its position was not substantially justified. *See Kali v. Bowen*, 854 F.2d 329, 334 (9th Cir. 1988)) (*citing Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 498 (9th Cir. 1987)). The Court also notes that when determining the issue of substantial justification, the Court reviews only the “issues that led to remand” in determining if an award of fees is appropriate. *See Toeblor v. Colvin*, 749 F.3d 830, 834 (9th Cir. 2014)).

The Supreme Court squarely addressed the meaning of the term “substantially justified.” *See Pierce v. Underwood*, 487 U.S. 552, 564-68 (1988). The Court concluded that “as between the two commonly used connotations of the word “substantially,” the one most naturally conveyed by the phrase before us here is not “justified to a high degree,” but rather “justified in substance or in the main” -- that is, justified to a degree that could satisfy a reasonable person.” *Id.* at 565. The Court continued, noting that the stated definition “is no different from the ‘reasonable basis both in law and fact’

1 formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals
2 that have addressed this issue.” *Id.* (citations omitted).

3 In addition, as stated by the Ninth Circuit, a “substantially justified position must
4 have a reasonable basis both in law and fact.” *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258
5 (9th Cir. 2001) (citing *Pierce v. Underwood*, *supra*, 487 U.S. at 565; *Flores v. Shalala*,
6 49 F.3d 562, 569 (9th Cir. 1995)). The Court is to focus on whether or not the
7 Administration was substantially justified in taking its original action; and, in defending
8 the validity of the action in court. *Id.* at 1259 (citing *Kali*, *supra*, 854 F.2d at 332).
9 However, “if ‘the government’s underlying position was not substantially justified,’” the
10 Court must award fees and does not have to address whether or not the government’s
11 litigation position was justified. *See Toeblor*, *supra*, 749 F.3d at 832 (quoting *Meier v.*
12 *Colvin*, 727 F.3d 867, 872 (9th Cir. 2013)). That is precisely the situation here.

14 Defendant, in essence, takes the position that since the District Court found that
15 defendant’s position was justified, even though the Ninth Circuit reversed, no attorney
16 fees should be awarded. *See* Dkt. 34, pp. 2-3. If this were the standard, then plaintiffs
17 would never recover attorney fees even though they were successful after appealing to
18 the Ninth Circuit and having the district court reversed. This should not be the standard.

19 As noted by plaintiff, the Ninth Circuit has indicated that it is a “decidedly unusual
20 case in which there is substantial justification under the EAJA even though the agency’s
21 decision was reversed as lacking in ‘reasonable, substantial, and probative evidence in the
22 record.’” *Al-Harbi v. INS*, 284 F.3d 1080, 1085 (9th Cir. 2002) (citations omitted).

24 Plaintiff persuasively argues as follows in his Reply in support of his fee petition:

1 In its decision on the merits, the Ninth Circuit reversed the ALJ's
2 decision because the ALJ improperly rejected [plaintiff's] testimony
3 regarding his level of pain and the extent of his symptoms, and the ALJ
4 also improperly rejected the medical evidence largely based upon his
improper rejection of [plaintiff's] testimony. (Internal citation to Dkt. 28,
pp. 2-7). Based on these errors, the Ninth Circuit remanded [plaintiff's]
claims for new hearing.

5 On the issues upon which the Ninth Circuit remanded this case,
6 neither the ALJ's decision or the Commissioner's defense of that
7 decision had a reasonable basis in law or in fact. However, because the
8 ALJ's on these issues was not substantially justified, this Court need not
address whether the government's litigation position was substantially
justified.

9 Dkt. 35, p. 3 (footnote and citations omitted).

10 As noted by plaintiff, defendant "argues that 'the ALJ discredited several
11 physicians' opinions because they relied on incorrect information about plaintiff's drug
12 and alcohol abuse; but, [defendant] here is citing to the District Court's decision that was
13 reversed by the Ninth Circuit." *Id.* As further noted by plaintiff, it is "the Ninth Circuit's
14 analysis that must be looked at to determine whether the ALJ's decision was substantially
15 justified." *Id.*

16 Although the Ninth Circuit agreed with this Court that plaintiff had made
17 inconsistent statements over the course of numerous years regarding his drug and alcohol
18 use, the Ninth Circuit noted that there were other years during which his allegations
19 appear to have been consistent with the medical record, and perhaps more importantly,
20 that this factor alone was insufficient to justify the failure to credit fully plaintiff's
21 allegations. Dkt. 28, pp. 2-7. Therefore, the ALJ's written decision did not have a
22 reasonable basis in law or fact.
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1 Therefore, the government's underlying position was not substantially justified.
2 *See Guiterrez, supra*, 274 F.3d at 1258 (citing *Pierce v. Underwood, supra*, 487 U.S. at
3 565).

4 The Court also concludes that there are no special circumstances which render an
5 EAJA award in this matter unjust.

6 Therefore, all that remains is to determine the amount of a reasonable fee. *See* 28
7 U.S.C. § 2412(b); *Hensley, supra*, 461 U.S. at 433, 436-37; *see also Roberts v. Astrue*,
8 2011 U.S. Dist. LEXIS 80907 (W.D. Wash. 2011), *adopted by* 2011 U.S. Dist. LEXIS
9 80913 (W.D. Wash. 2011).

10 Once the court determines that a plaintiff is entitled to a reasonable fee, "the
11 amount of the fee, of course, must be determined on the facts of each case." *Hensley*,
12 *supra*, 461 U.S. at 429, 433 n.7. According to the U.S. Supreme Court, "the most useful
13 starting point for determining the amount of a reasonable fee is the number of hours
14 reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*,
15 *supra*, 461 U.S. at 433.

16 Here, plaintiff prevailed on the single claim of whether or not the denial of his
17 social security application was based on substantial evidence in the record as a whole and
18 not based on harmful legal error. When the case involves a "common core of facts or will
19 be based on related legal theories the district court should focus on the
20 significance of the overall relief obtained by the plaintiff in relation to the hours
21 reasonably expended on the litigation." *See Hensley, supra*, 461 U.S. at 435. The
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1 Supreme Court concluded that where a plaintiff “has obtained excellent results, his
2 attorney should recover a fully compensatory fee.” *Id.*

3 The Court concludes based on a review of the relevant evidence that the plaintiff
4 here obtained excellent results. Therefore, the Court will look to “the hours reasonably
5 expended on the litigation,” which, when combined with the reasonable hourly rate,
6 encompasses the lodestar. *See Hensley, supra*, 461 U.S. at 435. Other relevant factors
7 identified in *Johnson, supra*, 488 F.2d at 717-19 “usually are subsumed within the initial
8 calculation of hours reasonably expended at a reasonable hourly rate.”¹ *See Hensley,*
9 *supra*, 461 U.S. at 434 n.9 (other citation omitted); *see also Kerr v. Screen Extras Guild,*
10 *Inc.*, 526 F.2d 67, 70 (9th Cir. 1975) (adopting *Johnson* factors); *Stevens v. Safeway,*
11 *2008 U.S. Dist. LEXIS 17119 at *40-*41 (C.D. Cal. 2008)* (“A court employing th[e
12 *Hensley* lodestar method of the hours reasonably expended multiplied by a reasonable
13 hourly rate] to determine the amount of an attorney’s fees award does not directly
14 consider the multi-factor test developed in *Johnson, supra*, 488 F.2d at 717-19, and *Kerr,*
15 *supra*, 526 F.2d at 69-70”); *but see Goodwin v. Astrue*, 2012 U.S. Dist. LEXIS 97651 at
16 *10-*12, *14-*20 (W.D. Wash. 2012) (applying *Johnson* factors), *adopted by* 2012 U.S.
17 Dist. LEXIS 97650 (W.D. Wash. 2012). These guidelines are consistent with Washington
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21 ¹ The *Johnson* factors are: (1) The time and labor involved; (2) the novelty and difficulty of the questions involved; (3)
22 the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance
23 of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the
24 circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10);
the ‘undesirability’ of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in
similar cases. *Johnson, supra*, 488 F.2d at 717-19) (citations omitted); *see also United States v. Guerette*, 2011 U.S. Dist. LEXIS
21457 at *4-*5 (D. Hi 2011) (“factors one through five have been subsumed” in the determination of a number of hours
reasonably expended multiplied by a reasonable rate); *but see City of Burlington v. Dague*, 505 U.S. 557 (1992) (rejecting factor
6 of contingent nature of the fee).

1 Rules of Professional Conduct 1.5.

2 Given the facts and circumstances of the matter herein, and based on the briefing,
3 declarations and attorney time sheet, the Court concludes that the amount of time
4 incurred by plaintiff's attorney in this matter is reasonable.

5 Specifically, following a review of plaintiff's request, the Court finds reasonable
6 plaintiff's request for expenses in the amount of \$36.54 and for attorney's fees in the
7 amount of \$15,192.95.

8 This attorney's fee (\$15,192.95) portion is \$14,801.05 (\$14,281.05 in attorney fees
9 and \$520 in paralegal fees) for the main case (including appeal to the Ninth Circuit), plus
10 \$391.90 (2.0 x \$195.95) for the reply, representing 75 attorney hours of work in the main
11 case (and 5.2 paralegal hours), as well as two hours defending his fee petition.
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13 Plaintiff also is awarded \$397.20 in costs.

14 CONCLUSION

15 Plaintiff's request for \$36.54 in expenses is granted.

16 Plaintiff is awarded \$15,192.95 in attorney's fees.

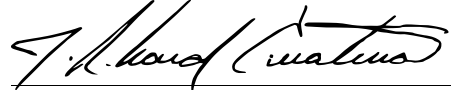
17 This motion for attorney's fees and expenses (Dkt. 33) is granted pursuant to the
18 EAJA and consistent with *Astrue v. Ratliff*, 130 S. Ct. 2521, 2524, 2010 U.S. LEXIS
19 4763 at ***6-***7 (2010).

20 Plaintiff also is awarded \$397.20 in costs pursuant to 28 U.S.C. § 1920.

21 Plaintiff's award is subject to any offset allowed pursuant to the Department of
22 Treasury's Offset Program. *See id.* at 2528. If it is determined that plaintiff's EAJA fees
23 are not subject to any offset, the check for EAJA fees shall be made payable to plaintiff's
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1 counsel, either by direct deposit or by check payable to Eitan Kassel Yanich, Esq., based
2 on plaintiff's assignment of these amounts to plaintiff's attorney. The checks for EAJA
3 fees, expenses and costs shall be mailed to plaintiff's counsel at Eitan Kassel Yanich,
4 Esq., PLLC, 203 Fourth Avenue E., Suite 321, Olympia, WA 98501.

5 Dated this 9th day of March, 2018.

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7 J. Richard Creatura
8 United States Magistrate Judge
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